

THE PLACE OF LAW IN ADDRESSING INTERNAL REGIME CONFLICTS

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Does justice want that these trials be limited, that they should not accuse the Communist system? Why? Does it believe that the massacre in Timisoara can be understood by avoiding the roots of the evil which lie in the totalitarian order?

Octavian Paler, an intellectual writing for the newly formed independent newspaper *Romania Libera*, advocating strongly for a more comprehensive approach to the trials in Romania¹

The victim's is an implacable viewpoint. It does not insist on revenge but it does insist on truth. It does not punish, but it does not acquit either.

György Konrád²

I

INTRODUCTION

Of the roughly 300 conflicts,³ international, non-international, and internal, including tyrannical regime victimization,⁴ which have occurred since the end of

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1. *Newspaper's Director on Post-Revolution Trials*, ROMPRES, Mar. 16, 1990, FBIS Daily Report (FBIS-EEU), Mar. 22, 1990, at 70, cited in IMPUNITY AND HUMAN RIGHTS IN INTERNATIONAL LAW AND PRACTICE 137 (N. ROHT-Arriaza ed., 1995).

2. György Konrád, *The Viewpoint of the Victim*, 2 CARDOZO STUDIES IN LAW AND LITERATURE 9, 11 (1990).

3. For the purposes of this article, "conflict" is defined as "public institutionalized armed conflict." Conflict includes armed conflict of an international character (the four Geneva Conventions 1949 and Protocol I of 1977), armed conflict of a non-international character (common article 3 of the four Geneva Conventions 1949 and Protocol II of 1977), and purely internal conflict, including tyrannical regime victimization (to which the Genocide Convention, the Torture Convention, and Crimes against Humanity apply). The definition corresponds with The Department of Peace and Conflict Research (Uppsala University, Sweden): An "armed conflict" is defined as a contested incompatibility that concerns government and/or territory where the use of armed force between two parties, of which at least one is the government of a state, results in at least 25 battle-related deaths. See Peter Wallensteen & Karen Axell, *Conflict Resolution and the End of the Cold War, 1989-93*, 31 J. PEACE RES. 333-49 (1994). Clearly, deaths through internal regime victimization do not occur within the traditional concept of "battle" or "armed conflict." That is, the victims are usually not armed or only minimally, have no collective cohesive nature other than that ascribed by the state as perpetrator, and can not be described as an "adversary" except in the terms of the ideological framework of the state. However, such internal conflict is public (through it being state conducted), institutionalized, and armed, and therefore corresponds to the framework definition stated.

4. The data in this article is based on the preliminary results of a study of armed conflict from 1945 (post-WWII) to 1996, compiled by the author at the International Human Rights Law Institute at DePaul University, under the direction of Professor M. Cherif Bassiouni.

World War II, excluding interstate armed conflicts,⁵ approximately one quarter of these have had some kind of legal redress, while the remaining three quarters have had none.⁶ From the first Latin American Truth Commission in Bolivia in 1982,⁷ approximately forty-one conflicts (including approximately seventeen uses of amnesty legislation) have been addressed, at least in part, through legal means. The legal redress has ranged from national and international prosecutions, to governmental commissions of inquiry and truth commissions, to the implementation of specific legislation such as lustration and compensation legislation, and to conscious amnesty legislation. The approximately 130 conflicts underway during 1982-96 (only twenty-two of which can be classified as interstate armed conflict) constitute just over one third of all conflicts. The evidence is that law⁸ is increasingly being called upon as a tool to address the post-conflict⁹ situation and facilitate societal changes.

It is increasingly assumed that law can and should play a central role in both the resolution of and progression from conflicts. The reasons put forward for this increasing role of law include the (growing) interrelationship between public order and legal order, and the expanding reach of law due to global forces: the human rights dictum is a global norm due indeed to globalization.¹⁰ It is assumed that the goals of the post-conflict society are synonymous with the capacities and reach of the institution of law. The argument presupposes what can be seen to be two central issues raised by the post-conflict society: (1) Where does the society go from here, that is, what are the short and long term goals, and (2) What role can law play in the transition, and in the realization of these goals?

5. The term interstate armed conflict is used to include war, territorial invasion, and border dispute.

6. Out of an estimated 285 conflicts, approximately 65 have been interstate armed conflicts. Of the remaining 220, law has played a role in the resolution of approximately 49. The types of resolution include the establishment of government commissions of enquiry and truth commissions, domestic and international prosecutions, domestic and regional or international civil claims and prosecutions, the enactment of legislation specific to the resolution of the conflict, and the passing of specific amnesty legislation. In some conflicts, only one of these measures was used; in others there has been a combination. Not included are what may be termed quasi-legal instruments such as reports of the International Commission of Jurists, United Nations Resolutions or the use of United Nations sanctions, or reports by United Nations bodies such as the Human Rights Commission.

7. Bolivia has been chosen as a marker due to its apparent influence on later and more successful truth commissions and inquiries. Note the earlier Ugandan Commission of Inquiry into the Disappearances of People in Uganda since 25 January 1971, held in 1974-75. A Report was published in 1975, in which 308 cases were documented and the security forces found to be guilty. The report was ignored, however, yet importantly, its status is of official history. See Priscilla B. Hayner, *Fifteen Truth Commissions—1974 to 1994: A Comparative Study*, 16 HUM. RTS. Q. 597, 611-13 (1994).

8. In this article, "law" is used to describe all legal mechanisms, ranging from national and international prosecutions, to governmental commissions of inquiry and truth commissions, to the implementation of specific legislation such as lustration AND COMPENSATION legislation and to conscious amnesty legislation.

9. Post-conflict has also been referred to as the "transition" phase. For the purposes of this article, the post-conflict period includes discussions regarding cessation of the armed conflict or regime victimization, and the period thereafter.

10. See Alex De Waal, *Becoming Shameless: The Failure of Human-Rights Organizations in Rwanda*, TIMES LITERARY SUPPLEMENT, Feb. 21, 1997, at 3. De Waal writes of the invention and birth of "human rights activism," and its now routine nature.

A distinction can be drawn between “public order,” which includes the legal order, and “civic order” goals. Myres McDougal, Harold Lasswell, and Lung-Chu Chen have argued that the legal order as a component of public order, as well as a protector of other institutions, must simultaneously comply with, nurture, and control these goals.¹¹ The challenge for the legal order, it is argued, is to propose provisions for incorporation into the formula of the world community which, if made controlling, will nurture and maintain a public order of human dignity under the dynamic conjuncture of developments that comprise the human context as a whole.¹² The question raised is to what extent are law and the application of concepts of accountability and redress seen as integral to the maintenance of “public order”? To what extent are the two synonymous?

The article begins in Part II by raising the issue of the nature of law and its place in the post-conflict situation. It asks to what extent the legal and non-legal may be integrated. It then focuses on the particular problem of how best law may address the post-conflict situation, discussing three particular problems: how law addresses crime perpetrated by the state, to what extent principles of domestic criminal law may successfully be applied to crimes of state, and to what extent an integrated theory of international criminology may be developed. It concludes in Part III by discussing the role that law can play in achieving “public order” goals, and what may be seen as a realistic role for law and legal institutions post-conflict.

II

LIMITATIONS AND STRENGTHS OF LAW

That law is increasingly being called upon as a tool to address the post-conflict situation and facilitate societal changes should come as no surprise. Legal sociology argues that society and its law are parallel, developing, interacting systems, with communitarians arguing for the recognition of an integral connection between law, community, and justice.¹³ A vision of society is always present in the law; an internal dynamic frames and fuels the deep structure of law.

There can be seen to be a “minimum” and a “maximum” role to law.¹⁴ The minimum is what we generally expect from law: It is law as the maintainer of order, a legitimate constraint to criminal behavior. It is law as providing common reference points in a society, as providing a framework for the orderly operation of society. It is David Danelski’s definition of law: law as a process in which human conduct is subjected to the governance of officially sanctioned

11. *See generally* MYRES S. MCDUGAL ET AL., HUMAN RIGHTS AND WORLD PUBLIC ORDER: THE BASIC POLICIES OF AN INTERNATIONAL LAW OF HUMAN DIGNITY (1980).

12. *See id.* at 374-75.

13. *See generally* PHILIP SELZNICK, THE MORAL COMMONWEALTH: SOCIAL THEORY AND THE PROMISE OF COMMUNITY (1992).

14. *See* Jennifer Balint, TOWARDS THE CREATION OF AN ANTI-GENOCIDE COMMUNITY: THE ROLE OF LAW, 1 AUST. J. HUM. RTS. 1, 12 (1994).

rules.¹⁵ This “minimum” of law promises no paradise, but it does promise a level of harmony.

The other level to law, however, and what may be most important in a discussion of the role of law in the post-conflict society, in what has been termed “transitional justice,”¹⁶ is the “maximum” to law. Law as “maximum” is the role that law can play in the direction and development of a society. Law as “maximum” is the way in which law can provide a framework (a central and legitimate framework) for discourse and debate. Law can be the forum within which a society’s burning issues are mediated—and possibly resolved. Law may be the forum for what has been termed the “moral conversation”¹⁷ or “communicative or discourse ethics.”¹⁸ Indeed, Jurgen Habermas has most recently argued that the institution of law is the modern repository of communal ethics (separate to individual personal morality), a function formerly held by institutionalized religion.¹⁹ Law in this way provides direction to a society, and it also may prove to be a bridge. The law is deeply tied not only to history but to a particular vision of the past and the future as articulated by the dominant groups in the framework of the nation state.²⁰

A. Role of Law in the Post-Conflict Situation

This article begins with what I see as a necessary discussion of how we can attempt to reconcile the broad aims and goals of the post-conflict society with the capacity and limitations of law. The category of conflict focused on is internal regime conflict.²¹ The central question is to what extent the institution of law can help in the realization of these goals; what is the role for law in the post-transition society? There has been a shift of emphasis and practice from law as primarily prosecutor, to law as educator, truth-teller, and reconciler.²² It

15. See David J. Danelski, *The Limits of Law*, in *THE LIMITS OF LAW* 8 (J. Roland Pennock & John W. Chapman eds., 1978).

16. Luc Huyse, *Justice after Transition: On the Choices Successor Elites Make in Dealing with the Past*, 20 L. & SOC. INQUIRY 1, 51 (1995); Ruti Teitel, *Transitional Jurisprudence: The Role of Law in Political Transformation*, 106 YALE L.J. 211 (1997).

17. SEYLA BENHABIB, *SITUATING THE SELF: GENDER, COMMUNITY, AND POSTMODERNISM IN CONTEMPORARY ETHICS* (1992).

18. See Jürgen Habermas, *Discourse Ethics: Notes on a Program of Philosophical Justification*, in *THE COMMUNICATIVE ETHICS CONTROVERSY* 60 (Seyla Benhabib & Fred Dallmayr eds., 1990); Karl-Otto Appel, *Is the Ethics of the Ideal Communication Community a Utopia? On the Relationship between Ethics, Utopia, and the Critique of Utopia*, in *THE COMMUNICATIVE ETHICS CONTROVERSY* (Seyla Benhabib & Fred Dallmayr eds., 1990).

19. JÜRGEN HABERMAS, *BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY* (William Rehg trans., 1996).

20. See Adam Czarnota & Piotr Hofmanski, *Polish Law deals with the Communist Past*, 22 REV. OF CENTRAL & EAST EUROPEAN L. 5, 521 (1996). This is particularly evident in constitutional legislation in east central Europe after the collapse of communism. See Adam Czarnota, *Constitutional Nationalism. Citizenship and Hope for Civil Society in Eastern Europe*, in *NATIONALISM AND POSTCOMMUNISM: A COLLECTION OF ESSAYS* 83 (A.Pavkovic et al. eds., 1995).

21. “Internal regime conflict” includes both civil war and tyrannical regime victimization or state repression.

22. In line with this, the argument often made in support of war crimes trials for crimes allegedly committed during World War II is that these trials be held so that the truth is told and the community

has been argued that the best role for law may foremost be found in three areas: accountability for perpetration of crimes during the conflict; redress for these crimes; and the attainment of a lasting sense of justice for the victims and survivors of these crimes and for the society as a whole. I argue that law cannot do everything; there are clear, important, and necessary limits in its functions and scope. In recognizing law's potential, we must also recognize its limits. Julius Cohen wrote that

[t]he enactment of a law is often ... like a game of chess—it is difficult to know in advance what one move will ultimately do to the rest of the board. There are limits also to what law can possibly control. Its power can readily extend to property, to things, and, to a limited extent, to persons. It can ... implement their acquisition, but it cannot secure their affection. It cannot erase hurt feelings, restore lost limbs, or bring back to a family a life that has been inhumanly snuffed out. For such pains and deprivations, compensatory palliatives are, at best, woefully inadequate.²³

The somewhat disturbing question being faced is to what extent prosecution of offenders is always the best way to proceed. This question is not a new one. It has been asked in many domestic jurisdictions under the exercise of “prosecutorial discretion.” In post-conflict situations, however, the question that frames these decisions is the place of law in society (which differs between different legal cultures), the strength of the legal and other institutions, and the weight what may be termed “the dictate of law” has in these situations. We are also being asked to consider the connection between law and justice. That is, does the institution of law always achieve justice, or can justice, both in its universal and particular form, be achieved through other means? Justice post-conflict may not always be found within the realm of law; it can be argued that this is a time when law and justice may be most divided. The law and the state may claim that the priority is to find “truth.” Victims may argue however, that the priority may be to prosecute,²⁴ or to seek their own retribution. Justice may also be found through other means—through education, media, future guarantees, or even the illegal.²⁵ There are different forms of justice as well as differ-

educated; that the alleged perpetrators be prosecuted only on the grounds that they committed crimes is generally placed in the background.

23. Julius Cohen, *Perspectives on the Limits of Law*, in *THE LIMITS OF LAW* 39, 43 (J. Roland Pennock & John W. Chapman eds., 1974).

24. Two examples illustrate this point. First, the family of Steve Biko, killed in 1977 after his arrest, are protesting the granting of amnesty to his killers, some of whom (five former police officers) have now come forward to the South African Truth and Reconciliation Commission (TRC). They are asking for prosecution. The answer they are given is that without the TRC, and the concurrent amnesty, the South African government would not know who the killers were and would not be able to prosecute anyone. In this way, the truth is at least known. Second, after limited trials in 1972 in the aftermath of the killing of more than 1.5 million Bengalis and Hindus in the secession of Bangladesh, a deal was made between India and Pakistan and a general amnesty given. In 1991 a citizen movement, aimed at eliminating the “Killers and Collaborators of 1971,” demanded a trial of Golam Azam, the head of one of the political parties, for complicity in the 1971 killings. A non-official public trial was held.

25. Consider reprisal killings for example. Note too the debate over the trial of Adolf Eichmann: Was it both illegal (in terms of the arrest procedure and the lack of standing of Israel (the state did not exist at the time the crimes were committed)) and just (in terms of it being unjust not to try him for the crimes committed)?

ent levels of justice. Is it not more correct to see law as a crucial piece in the “jigsaw” of accountability, that it cannot *be* accountability, but that it is a crucial factor in the achievement of accountability.

B. Law and Political Realities

Given the realities of the post-conflict political scenario, the use of law does pose certain challenges. The essence of the rule of law and not the rule of men is said to be that law brooks no tolerance for the overtly political, that law has a certain independence, that it is fueled by the demands of justice, and struggles to achieve this. In the post-conflict situation, however, it has been argued that classical law in the prosecutory sense is a luxury, due often to the weakness of legislative and legal institutions and the contrasting strength of the military,²⁶ and that law should seek other avenues and in this way strive to achieve its full potential, that of providing a normative framework for the future development of a society. The post-conflict society provides an ideal setting for the potential of law; however, it is an ideal setting with a catch. The catch of course is the clear intrusion of political considerations, and the “adaptation” of law to these considerations. But is law’s political framework in post-conflict situations necessarily always negative? The clearest and most oft-cited and practiced example of politics intruding into the practice of law is the provision of amnesties for military leaders, where political leaders will argue that they have the long term interests of the society in mind, and that the precarious situation of the new government does not lend itself to prosecution of the former leaders. This need to maintain a strategic relationship with the armed forces was put forward, for example, by President Alfonsín in his decision to hold only limited trials in contrast to his earlier stand of full accountability for the military in Argentina’s “Dirty War.”²⁷

It can be argued however, that a spectrum exists. That is, although it is clear that decisions as to which legal mechanisms to use and to what extent will always to some degree be politically motivated and framed by the political situation,²⁸ this is not always to the detriment of the goals of the society. As Mac Maharaj, Minister of Transport of South Africa, noted, although political imperatives determined the balance for the decision as to how to achieve accountability in South Africa, the country must always be the winner. “We can do this, however,” he stated, “through creating an institutional response to the past which, we hope, will serve our country well into the future.”²⁹

26. It is not only official institutions such as the military that offer resistance to “transition.” Unofficial *nomenclature* networks need the same “unraveling” and potential dismantling.

27. Elizabeth Jelin notes that analysts and actors close to the human rights movement agree that at the time of transition (late 1983 and 1984) the government had enough leeway to act more aggressively toward the military, weakened by its retreat from the political arena and the Malvinas war. See Elizabeth Jelin, *The Politics of Memory: The Human Rights Movement and the Construction of Democracy in Argentina*, in 81:2 LATIN AMERICAN PERSPECTIVES 21, 47 (1994).

28. Of course, all law is to differing degrees politically shaped.

29. Mac Maharaj, *Justice Or Reconciliation: The Situation in South Africa Today*, Address Before The Third Annual WBEZ Sondra Gair Memorial Lecture, Chicago, IL (Apr. 25, 1997).

C. Integration of the Legal and the Non-Legal

How then can the legal, the extra-legal, and the non-legal be integrated systematically and effectively in addressing the post-conflict situation? There are a range of mechanisms and policies available to addressing such post-conflict situations, not all of them traditional legal remedies.³⁰ The question arises as to what extent one can create a cohesive systemic policy that incorporates both legal and quasi-legal remedies, and that embraces non-legal practices. The question is an interesting and pertinent one. It asks to what extent such a system can integrate the differing dynamics of each situation, in particular the socio-political scenario and the personalities involved. Decisions are made at each stage of the process of addressing the conflict. It is suggested that these decisions must be informed and framed by a comprehensive approach that attempts to place the role of law in the context of the particular societal situation as well as uphold international policy goals.

International law operates on the fringe of the formal and the informal, which produces both possibilities and dangers. The lack of formality of international law can mean that the rules are not always known, that decisions are made as much along the line of personalities and political and economic factors as along the line of strict law. However, it can be seen that the informality of the operation of international law, the way in which the practice often steps outside of strict legal bounds, is necessary to inform its very nature. The late international lawyer B.V.A. Röling, in an interview with Antonio Cassese, noted that “the link between international law and politics is much closer than in national relations[, and that] the international lawyer’s task is more than ever concentrated on *lex ferenda*: in what direction are adaptation and regulation needed?” He added that to answer “these questions the lawyer needs to cooperate with other branches of knowledge,” and that the “new approach” to international law is a “multi-disciplinary approach” to law.³¹

D. Law and State Crime

The majority of conflicts within which grave human rights violations have been perpetrated are what may be termed internal “regime” conflicts, which include both civil war and tyrannical regime victimization or state repression. The direct involvement of the state in the victimization of its own civilians, and the deep institutional implication of the institutions of the state (namely, the military and the police, the judiciary, and the legislature) raises difficult issues, issues different from those that criminal justice at the national level is accustomed to dealing with. When nationals of one state are killed or persecuted by the military of another state, resolution is more easily reached. However, when

30. The role of communities and groups within the society in terms of education, “bridge building,” and other informal dispute mechanism procedures is an under-explored important area. Note too the important role that unofficial projects play, what Priscilla B. Hayner terms “independent truth commission-like projects.” Hayner, *supra* note 7, at 651-52.

31. B.V.A. RÖLING, *THE TOKYO TRIAL AND BEYOND. REFLECTIONS OF A PEACEMONGER* 138 (Antonio Cassese ed., 1993).

nationals of one state are killed or persecuted by the apparatus of that state, then the issue is a much broader and more complicated one. The parameters are different, and the context is different. What is being asked of here is the addressing of the institutions of the state which constitute the basis of the state and its legitimacy. This raises the question as to the applicability of the traditional criminological paradigm. How law deals with addressing these issues goes beyond its traditional role as sanctioner and prosecutor.

Methodologically, there are two ways to approach the issue of how best to address post-regime conflict situations using legal means. First, the problem can be set out, as noted, as a traditional criminological one, analyzing the worth of the major criminal justice theories—retributivism, utilitarianism, and preventionism—and then attempting to balance these within each particular situation. The argument can be made that crimes have been committed and that they must be addressed. How they will be addressed can then be analyzed through these different theories of crime. Yet to what extent can traditional criminology be meaningfully applied at the national or international level to post-conflict situations when the state is the main actor? How far can such theory assist in formulating decisions as to which remedies to use and in achieving hoped-for results? We can ask the questions that are traditionally asked within the context of domestic criminal justice: Why prosecute? What do prosecution and incarceration achieve? What is the purpose of punishment? What does it mean in real terms to be “accountable”? From here we could then establish a “wish list” of what should or could happen in post-conflict situations. Yet to what extent will this be of use in formulating a comprehensive and integrated set of policy guidelines to assist in addressing post-regime conflict situations with their different parameters and taking into account the different role played by law in such situations?

The second method of approaching the post-conflict situation and the issues it raises involves two stages and begins with a rebuttal of the previous method. The first stage is to distinguish domestic crime from international state crime³² and to thus make a distinction between domestic criminal justice and international criminal justice. The principle foundation for this argument is that any system of criminal justice must take into account the context within which the crime occurs and that the context, factors, and outcomes of state crime are different from that which may be termed “ordinary” domestic crime. Therefore, the parameters of the decision as to which remedy to use and for what reasons are different for crimes of states and crimes of non-states. Thus, what accountability is to mean, that is, how “accounts” may be “settled,” is different for state as compared to non-state crime.

State crime, due to its institutional character, is different to individual or even group crime. Not only institutionalized as such—for it can be argued that there are non-state crimes that are also institutionalized, for example, Mafia and drug crimes—but institutionalized through the state, which means that the

32. One crime that resides in a “grey” area is the crime of terrorism.

institutions of the army and the judiciary, as arms of the state, are also implicated in the crime. Max Weber pointed out that the essential distinguishing feature of all states, as sets of institutions, is their monopoly or pretense of monopoly over legitimate acts of violence.³³ When the army and its members are condemned for their actions, and the violence is thereby deemed illegitimate, the state is implicitly condemned. The comment was made at an exhibition demonstrating the participation of the Wehrmacht (the German Army) in the killing of civilians during World War II, that “what is on show here is nothing short of the systematic use of the army as state executioner.”³⁴

The state, notes Alfred Stepan, “must be considered as more than the ‘government.’ It is the continuous administrative, legal, bureaucratic and coercive systems that ... structure relationships between civil society and public authority.”³⁵ This means that in order to provide *redress* and *accountability* for state crimes, it is not only a matter of prosecuting individuals, but of finding a way of “unraveling” the many layers of responsibility, accountability, knowledge, and complicity that provided the important institutional support in the perpetration of these crimes. Prosecution of a few individuals will not achieve this.³⁶ Truth Commissions do not necessarily achieve this either.³⁷ The important work which needs to be done is to investigate which processes of accountability, investigation, and redress achieve which element of “unravelling.”

This is not to suggest that the individual instigators of the crimes should not be called to account and punished. It is irrefutable that certain key leaders were and are primarily responsible for particular victimizations—Hitler for the Holocaust, Pol Pot for the genocide in Cambodia, Idi Amin for the terror in Uganda, Stalin, Lenin, and Mao, and the list goes on.³⁸ It is clear that these leaders should be punished. It is also clear that in order to investigate institutions one must deal with the individuals within these institutions. Otherwise, for example, the institutions may well be dismantled in form but be reassembled under another guise. Finally, it has been established that the three core

33. See MAX WEBER: ESSAYS IN SOCIOLOGY 78 (Hans Gerth & C. Wright Mills eds., 1948), cited in P. Timothy Bushnell et al, *State Organized Terror: Tragedy of the Modern State*, in STATE ORGANIZED TERROR: THE CASE OF VIOLENT INTERNAL REPRESSION 6 (P. Timothy Bushnell et al. eds., 1991).

34. See Stephen Plaiice, *What did you do in the war, Vater?*, GUARDIAN WEEKLY, Mar. 23, 1997, at 34.

35. ALFRED STEPAN, THE STATE AND SOCIETY: PERU IN COMPARATIVE PERSPECTIVE (1978), cited in Rhonda E. Howard, *Repression and State Terror in Kenya*, in STATE ORGANIZED TERROR: THE CASE OF VIOLENT INTERNAL REPRESSION 81 (P. Timothy Bushnell et al eds., 1991).

36. Note too the differing levels and spheres of responsibility. Karl Jaspers distinguished importantly between criminal guilt, political guilt, moral guilt, and metaphysical guilt. See KARL JASPERS, THE QUESTION OF GERMAN GUILT (1948).

37. It is to be noted, however, that one stage of the South African Truth and Reconciliation Commission has been the presentation by institutions of formal submissions in special hearings, which focus on the conduct of these institutions during the apartheid era. These institutions include the judiciary, the medical profession, the media, and the military.

38. International law, particularly since WWII, has emphasized exercising jurisdiction over individuals rather than states. See Otto Triffterer, *Prosecution of States for Crimes of State*, in III INTERNATIONAL CRIMINAL LAW 101 (M. Cherif Bassiouni ed., 1986).

crimes of genocide, crimes against humanity and war crimes, as well as torture, in both times of war and times of peace, are international crimes that have risen to the level of *jus cogens*, and that there exists therefore an inderogable obligation to prosecute or extradite the individuals responsible.³⁹ Yet it also needs to be recognized that the scope of these crimes could not have been as large without the harnessing and the transformation of key societal institutions. In order to address the situation fully and provide a level of stability and order for the future of the society, these institutions, and thereby the parameters within which the crimes occurred, need to be addressed.⁴⁰

The next stage of the second method of approaching such post-conflict situations involves asking two questions: First, to what extent has a systematic cohesive international criminology been developed, and, second, to what extent can it be developed? The second stage thus argues for a differentiated theory of international criminology, one which recognizes both the different parameters in such crime and the need to incorporate alternative non- or extra-legal institutions and strategies in addressing such post-conflict situations. This stage acknowledges that the law itself may have been put to the periphery, used as a tool, or destroyed during the conflict, and may have to first rebuild itself in order to play any sort of necessary, central and legitimate role in the transition process. It recognizes that law may be functioning simultaneously to address the same situation in a number of different locations and through different means. For example, the 1994 Rwandan genocide is being addressed both nationally and internationally through domestic prosecutions and the International Criminal Tribunal for Rwanda in Arusha. The break-up of Yugoslavia is being addressed internationally in the Hague through both the International Criminal Tribunal for the former Yugoslavia and the application filed by Bosnia-Herzegovina against Serbia-Montenegro being heard at the International Court of Justice, as well as through at least one tort claim in the United States.⁴¹

Although there exists comprehensive criminological theory at the level of domestic crime,⁴² there is as yet no comprehensive criminological theory at the international level for crimes of state. Such a criminology of international law is still fledgling. There is clearly a normative understanding of what "crime"

39. See M. CHERIF BASSIOUNI & EDWARD WISE, *AUT DEDERE, AUT JUDICARE* (1995); M. CHERIF BASSIOUNI, *CRIMES AGAINST HUMANITY IN INTERNATIONAL CRIMINAL LAW* (1992).

40. One issue that may illustrate the difficulties in addressing state crime involving gross victimization is that of liability. In domestic crime, all involved in a crime are liable, accountable, and prosecutable (except in certain mitigating circumstances). Internationally, with state crime, decisions are generally made not to prosecute all involved in the crime, for this would often mean the indictment and prosecution of the whole society. At one extreme was newly elected President Cerezo Arevalo of Guatemala's comment in November 1985: "We are not going to be able to investigate the past. We would have to put the entire army in jail." Stanley Cohen, *State Crimes of Previous Regimes: Knowledge, Accountability and the Policing of the Past*, 20 L. & SOC. INQUIRY 7 (1995).

41. See the tort claim at *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995), *cert. denied*, 116 S. Ct. 2524 (1996).

42. However, this has been challenged by criminologist John Braithwaite and political philosopher Philip Pettit. See JOHN BRAITHWAITE & PHILIP PETTIT, *NOT JUST DESSERTS: A REPUBLICAN THEORY OF CRIMINAL JUSTICE* (1990).

means, and an identification (ever expanding) of international crimes.⁴³ There is an appreciation of the linkage between political context and law. This can not however substitute for a criminology of international crime. What this has meant is that international crime and post-conflict situations have been addressed in an ad hoc and non-systematic manner. Although this is partly due to the lack of mechanisms through which to address international crime and enforce punishment, it has more to do with the lack of any comprehensive theory of crime and redress at the international level. Whereas precedents, some mechanisms, and a feeling (codified) of general “wrongness” exist, and whereas every post-conflict situation has a number of legal and extra-legal redress options available to it, there are no policy guidelines to guide such decisions. What exists has, it can be argued, been informed, albeit necessarily, by the politics of international relations. The question then arises as to what extent a separate criminology of state crime can (or does) exist. There exists no theory or set of principles which can both encompass all questions and issues and answer them in a non-contradictory manner. It could be argued that the closest we have come to any kind of international criminology has been encapsulated in the simplistic phrase “justice or peace, justice and peace” and an attempt to balance them both. Although it is recognized that each conflict is *sui generis*, common themes and patterns can be analyzed and a cohesive approach thus applied.

John Braithwaite and Philip Pettit have argued for an integrated comprehensive normative theory of the (domestic) criminal justice system, an argument which can be put forward, within different parameters, at the international-national level as well⁴⁴:

A comprehensive theory of criminal justice may be capable of generating a set of answers to policy questions which is complete, coherent, and systemic.... Note that it may be complete without being a unitary theory that applies the same yardstick to each question. A number of yardsticks may be applied and weighted differently in answering different questions. A comprehensive theory is coherent in so far as the answers provided are consistent with one another. The prescriptions provided in answer to one question must not negate the prescriptions supplied in answer to another.⁴⁵

It is necessary to formulate such a set of principles and policies: a “set of answers.” How these policy goals will be ordered and prioritized is dependent upon different priorities and different perspectives, which range from the strategic to the practical to the psychological to the sociological to the moral to the philosophical to the purely legal. A comprehensive theory will ensure that the principles are upheld in a non-contradictory manner. It is the comprehensive theory which enables, to quote Braithwaite and Pettit, the “generat[ion] of a set of answers to policy questions which is complete, coherent and systemic.”⁴⁶

43. See M. CHERIF BASSIOUNI, INTERNATIONAL CRIMES: DIGEST/INDEX OF INTERNATIONAL INSTRUMENTS, 1815-1985 (1986).

44. See BRAITHWAITE & PETTIT, *supra* note 42, at 15.

45. *Id.*

46. *Id.*

III

“PUBLIC ORDER” POLICY GOALS

Goals for the post-conflict society, termed “public order goals” have been suggested by a number of authors. In drawing a firm connection between legal systems and the maintenance of public order, W. Michael Reisman has suggested that there are seven fundamental goals common to all legal systems for the protection, restoration, and improvement of public order.⁴⁷ The common denominator of all these goals, he argues, should be to protect, reestablish or create a public order characterized by low expectations of violence and a heightened respect for human rights.⁴⁸ The goals Reisman lists are as follows:

- (1) Preventing discrete public order violations that are about to occur;
- (2) Suspending public order violations that are occurring;
- (3) Deterring, in general, potential public order violations in the future;
- (4) Restoring public order after it has been violated;
- (5) Correcting the behavior that generates public order violations;
- (6) Rehabilitating victims who have suffered the brunt of public order violations; and
- (7) Reconstructing in a larger social sense to remove conditions that appear likely to generate public order violations.⁴⁹

The role that law can play in achieving each of these goals is very different. It may, for example, provide a central framework for resolution on the communal level, however it can not be that resolution. Systemic institutional reform and “unraveling” may be informed by the personal (for example, through testimony), but it can occur only on the level of the state. In terms of reconciliation, for example, Mahmood Mamdani suggests that there are two distinct spheres and types of reconciliation: the narrow political reconciliation that is limited to the political elites and state agents, and the broader social reconciliation that includes victims, two spheres that exist in tension with each other.⁵⁰ Mamdani recognizes that there are degrees of reconciliation that draw a relationship to forms of justice. Although state law exists at the official level, it can impact other levels.

What is the role for law in such policy goals? More specifically, to what extent can the concepts of accountability and redress (and the connected legal institutions) assist in achieving these goals? How can these goals be achieved,

47. See W. Michael Reisman, *Institutions and Practices for Restoring and Maintaining Public Order*, 6 DUKE J. COMP. & INT'L L. 175 (1995).

48. *Id.* at 176.

49. *See Id.*

50. See Mahmood Mamdani, Plenary Address, *Justice or Reconciliation*, The University of Chicago Law School, Center for International Studies Conference, The University of Chicago, Apr. 26, 1997.

with which combination of the legal and the extra-legal? How can the maximum good (over the maximum harm) for the national community, the international community and for the victims be attained? The remedy or remedies used to address each situation can be seen to be dependent on (1) the situation itself and its particular elements (particular elements including the specific socio-political context and the dominant legal culture) and (2) the framework and goals within which the international and national community are functioning: the proposed comprehensive international criminology. In order to achieve these goals, Reisman suggests the concept of a "tool box of institutions":⁵¹ that each remedy be tailor-made to fit both the conflict and the will of the international and the national community, to provide the best return on the stated public order goals. Reisman concludes:

There is no general institution that can be applied as a paradigm for all circumstances. In each context, an institution appropriate to the protection and re-establishment of public order in the unique circumstances that prevail must be fashioned such that it provides the greatest return on all the relevant goals of public order.⁵²

Two questions are raised. First, when are legal institutions helpful and when are they not in achieving these stated goals? Second, how are such decisions (as to which institution to use and in which form) made, and can they be made in an ad hoc manner, outside of a systemic framework?

The idea of a "tool box of institutions" is on one level conceptually useful. Its value, however, is wholly dependent upon what drives the decision of which "tool" to use: whether this decision is based upon consistent remedies agreed upon by the international community for particular crimes and victimizations, upon a cohesive international criminology, upon enduring values of the international community, or upon a set of underlying principles, or whether the decision is based upon what may be termed political expediency and solely upon the particularities of individual situations. Such a decision as to which set of remedies to use must be based within a framework. If we are to balance our stated goals, it is important that this not be done in an arbitrary, ad hoc manner, but in a way that is consistent and fair. This framework will comprise fundamental values of the international community and a set of goals for addressing post-conflict situations. The specifics of the particular conflict and the tools available will necessarily and importantly shape the decision as to the international and national response to the conflict, however it is critical that these decisions are guided and cohesive, and that the balance struck is one that satisfies the particular situation and its needs and the needs of what has been termed "world order."⁵³ It is imperative that a framework be established that is informed by our knowledge of situations both past and present, based on fundamental goals of the international community, and framed by a comprehensive criminology specific to crimes of state. How best to implement these goals can then be assessed in this light and in light of the particularities of the situation.

51. Reisman, *supra* note 47, at 175-76, 186 & n.40.

52. *Id.* at 185.

53. *See generally* MCDUGAL ET AL., *supra* note 11.

Such a contextual analysis can be simultaneously macro and micro.

Balancing these goals occurs at every level: at the first decision at the international level to intervene; at the choice (both national and international) as to which practice or institution (if any) to use; and at the time of the exercise of the practice or institution (for example, between the protection of due process and the public desire for speedy retribution, or, for example, within the Rwandan government's dilemma over sentencing). The concept of a *mosaic* of legal remedies is most useful: the cooperation between national, international, and regional legal institutions, and between different spheres (personal, communal and state/institutional) in these areas.

It is now necessary to return to the original question: the role that the institution of law can be expected to play in fulfilling such goals, and the extent to which these "fundamental goals" are integral or even possible to the function of legal institutions. In asking what the role of law and legal institutions are at the level of state crime and in the post-conflict society, we ask to what extent concepts such as *accountability*, *redress*, and *reconciliation* can be raised from the individual to the communal and the state level. As Michael Ignatieff asks: "Can we speak of nations 'working through' a civil war or an atrocity as we speak of individuals working through a traumatic memory or event?"⁵⁴ There are clearly different levels at which regime conflict is worked through. They may and indeed do intersect, but they should not be confused. There are three basic spheres, framed by the global: (1) the institutional/state level; (2) the communal level; and (3) the personal level.

IV

LAW AND "PUBLIC ORDER"

There are four specific ways in which the use of the institution of law can satisfy the goals of public order:

(1) It can provide *acknowledgment* of what has happened. Importantly, it can provide *official* acknowledgment.

(2) It can be a *foundation moment* for the society⁵⁵ and thereby an important basis for further societal healing and reconciliation.

(3) It can provide a *statement of the facts* of what has happened.

(4) It can provide *punishment* and thereby *justice* and an important level of *accountability*.

These are, essentially, immediate post-conflict goals. If we conceptualize the

54. Michael Ignatieff, *Articles of Faith*, INDEX ON CENSORSHIP (1996), excerpts reprinted in *The Elusive Goal of War Trials*, HARPER'S MAGAZINE, Mar. 1997, at 15.

55. Elizabeth Jelin notes that the trial of the military commanders in Argentina was the institutional authentication of the "truth" (through the authority of the judiciary) that had been explicated in the report *Nunca Más* (the report of the conclusions of the CONADEP Truth Commission, which had been widely distributed) and the foundational moment of "justice." See Jelin, *supra* note 27, at 38.

post-conflict period as a series of stages, these goals occur in the first stage after the conflict. Law can specifically address and work to fulfill these goals because they fit within what may be termed law's "frame of reference." Of course, prior to these goals, comes the goal of cessation of the conflict. The way in which the conflict ends provides the context within which the conflict will be addressed. Although it is only after the conflict has ended that law can work toward fulfilling these goals, the form that is taken (for example, the extent to which there is punishment or there is acknowledgment) is very much bound to the context of how the conflict actually ends. In fact, these issues are often integral to the cessation of the conflict. Juan Mendez notes that the issue of accountability comes within the context of *how to make peace*, the ingredients which are used to end the conflict.⁵⁶ The goals of restoration, reconstruction, and reconciliation constitute part of the next stage, and they are followed by the futuristic goals of prevention, deterrence, and correction (to use Reisman's terms⁵⁷), upon which, it can be argued, the impact of law is slight.

Different legal and quasi-legal institutions possess different strengths and have different roles to play at different phases of the post-regime conflict period. These will be discussed briefly below.

A. Official Acknowledgment

Justice Goldstone has noted that the importance of the South African Truth and Reconciliation Commission cannot be underestimated in terms of acknowledging what apartheid has meant: "If it were not for the Truth and Reconciliation Commission people who today are saying that they did not know about apartheid would be saying that it didn't happen. This is a fact, and it cannot be underestimated."⁵⁸ Official acknowledgment is a necessary first step.⁵⁹ The publication of Truth Commission reports, such as *Nunca Más* in Argentina, or the publication of judgments, do constitute official acknowledgment of what has happened. Official investigations such as the Australian Royal Commission into Aboriginal Deaths in Custody or the more recent Australian Human Rights and Equal Opportunity Commission Report into the forced separation and removal of indigenous children in Australia,⁶⁰ also provide important, official recognition of institutional harm and persecution and the need for systematic institutional reform and acknowledgment of the reality of such harm. Such official legal and quasi-legal redress and investigation may not "flow down" to become societal or personal acknowledgment. However, as

56. See Juan Mendez, Plenary Address, *Justice or Reconciliation*, The University of Chicago Law School, Center for International Studies Conference, The University of Chicago, Apr. 26, 1997.

57. See Reisman, *supra* note 47.

58. Justice Richard Goldstone, *Justice or Reconciliation*, The University of Chicago Law School, Center for International Studies conference, The University of Chicago, Apr. 26, 1997.

59. See Huyse, *supra* note 16, at 53.

60. See Sir Roland Wilson, *Bringing Them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families* (1997). The implementation of recommendations in such reports is, of course, the necessary next step, which too often is not forthcoming.

official institutional knowledge⁶¹ this can provide a necessary foundation for later societal reconstruction and institutional transformation.

The importance too of such official acknowledgement for victims cannot be underestimated. The lack of official acknowledgement can be devastating to victims and survivors. This can most pertinently be seen in the case of the gross denial by the Turkish state of their genocide of the Armenian community during World War I. This lack of central and legitimate acknowledgement and ultimately lack of resolution has meant that the Armenian community has been forced to fight for the resolution of their suffering and the harm done to them.

B. Foundation Moment

In the regime transition that occurs, legal mechanisms may play the role of marking the transition. This is done through the creation of a record, the stating that wrongs have been done, the institutionalization of such a statement, and the gathering of evidence. Such a collective memory can work toward ensuring a certain path is followed in keeping with the values of the society and its direction.⁶² In this way, law as “maximum” can come into play. Mark Osiel has suggested that the use of such trials and commissions may cultivate a shared and enduring memory of the horrors and that law should be consciously employed toward this end, in this way cultivating a culture of deterrence.⁶³ Osiel conceptualizes the trials and commissions as ritual, a shared social drama.⁶⁴ Although this is an important role for law, such a statement must be tempered with practical realities. For example, in the case of the International Criminal Tribunal for Rwanda, which is being held in the town of Arusha, out of range for the majority of Rwandans, there will be no shared social drama. However, in the case of the domestic trials, with their transmittance through radio, there may be, and as such, the trials may be a central part of this “foundation moment.”

C. Statement of the Facts

Legal mechanisms such as international and national prosecutions, and international and national truth commissions and investigatory bodies, do provide a set of facts regarding violations committed by the prior regime. It is to be noted, however, that neither the truth commission nor the trial can tell the “full story” with all its shades and nuances and dark places. Both can hope only to establish an agreed upon set of facts, which will outline, if you like, what has happened. Although the truth commission can achieve this more fully than the trial, it is to be noted that telling the full story of what has happened is not the

61. Note the distinction made by Thomas Nagel, of moving from knowledge to acknowledgment. Cited in Lawrence Wechsler, *A Miracle, A Universe: Settling Accounts with Torturers*, in I TRANSDISCIPLINARY JUSTICE, 292 (Neil J. Kritz ed., 1995).

62. See Jelin, *supra* note 27, at 49-51.

63. See Mark J. Osiel, *Ever Again: Legal Remembrance of Administrative Massacre*, 144 U. PA. L. REV. 463, 466 (1995).

64. *Id.* at 473.

primary aim of the trial and indeed the trial framework has certain constraints. However, with both mechanisms, there will be gaps and different perceptions. One example are the stories that may be “untellable” in particular forums or under certain circumstances, one being the story of rape. The crime of rape is rarely spoken of in the ordinary courtroom. Why then is it more likely that it will be spoken of in a more public setting? Another type of “hidden story” is related by Elizabeth Jelin in the context of resistance in Argentina. Jelin notes that in Argentina collective reactions to violations emerged outside the human rights organizations, emerging in social spaces where group activities and organizations had existed beforehand. Such protests have persisted in the memory of the local participants and in a kind of “public silence,” yet have not become part of the “official story” of the resistance to the dictatorial regime.⁶⁵

On the other hand, to what extent is the telling of the full story the role of law? Of necessity, prosecutions tell only one part of the story: They focus on a person and their role in the facts of the story. Moreover, truth commissions generally focus on gross violations of human rights, not on all that happened during the prior regime. As Minister Mac Maharaj stated, “the Truth and Reconciliation Commission in South Africa is not expected to give the ‘A-B-C’ of what apartheid did to us in South Africa.” Then again, as Mahmood Mamdani replied, why then does it possess the title of *Truth* and Reconciliation Commission? Why not have the title of “The Human Rights Violations Commission”?⁶⁶ This is an example of where legal mechanisms need to work in conjunction with each other and with other non-legal mechanisms, including, as Mahmood Mamdani commented, historians.

D. Punishment and Thereby Justice and Accountability

Punishment, either through the traditional method of prosecution, or through the also traditional process of shaming through the mechanism of a Truth Commission or lustration legislation, is what the law does best. And it is here that law may be seen to have the most unambiguous success. Although there are difficult issues of who exactly to prosecute, the differing layers of liability, and the practicalities of prosecution in the post-regime conflict state, it is clear that punishment does establish a level of accountability. The extent to which it establishes justice however is a difficult question. To address this on the level of the victims, to what extent is justice achieved for them or for the survivors? It is here where we need to distinguish between social justice and legal justice. Does legal justice bring back a lost education, a lost life? No. It may, however, help in other ways. For example, where civil compensation is derived from the criminal system, criminal prosecution is of great significance. Justice operates to differing degrees on the levels of the personal, the communal, and the state.

65. See Jelin, *supra* note 27, at 45.

66. See Mamdani, *supra* note 50.

E. Cessation

As stated above, the manner in which the conflict is brought to an end provides the important context for future state action regarding the use of law and the practicalities of accountability. Important factors include whether the armed conflict is ended through military overthrow, through national negotiation, or in conjunction with international negotiation. Also important are the strengths of the legal and political systems, the comparative strength of the military, and national and international political will. If the conflict is ended through outside intervention or military defeat, such as in the case of Rwanda, the former Yugoslavia, and Japan and Germany in World War II, it is much more likely that a penal tribunal will be instituted. However, this is not always the case. Other options include a negotiated peace settlement. If the conflict is ended through both internal and regional/international intervention, there is also a good chance that prosecutions will ensue, but it is dependent upon the fragility of the situation and whether the conflict is still continuing on some level. In the context of possible impunity, the issue is to what extent or whether the perpetrators are offered immunity in exchange for an end to hostilities. This was the case in Haiti, for example, where, as Michael Scharf has argued, both the United States and the United Nations saw the carrot of amnesty, together with the stick of threatened force, as the best way to persuade the military leaders to step down without a fight.⁶⁷ If the promise of amnesty is the only way in which the harm can be ended, is this adequate? Or are such considerations baseless? As Anthony D'Amato notes, however desirable the idea of war crimes accountability might appear in the abstract, pursuing the goal of a war crimes tribunal may simply result in prolonging a war of civilian atrocities.⁶⁸ Where does the promise of immunity and the absence of prosecution stand on the scale of the decision by human rights violators whether to relinquish power or not? In purely internal conflicts, where the conflict may cease slowly, this is a relevant question.

The balance that is necessary to strike here is between the immediate halt of the conflict and the probable saving of lives and the future consequences of immunity, which include a potential precedent for other human rights violators, illegitimacy for the institution of law (both nationally and internationally), and the possible reemergence of the conflict at a later stage. In the cessation of the conflict, there is generally an absence of law.

F. Restoration, Reconstruction, and Reconciliation

Law can provide a legitimate forum for change as well as a forum for dialogue. However, it can also be said that law is incidental to the three goals of restoration, reconstruction, and reconciliation. The role of other institutions should not be neglected, notably the institutions of civil society. This is one as-

67. See Michael P. Scharf, *SWAPPING AMNESTY FOR PEACE: WAS THERE A DUTY TO PROSECUTE INTERNATIONAL CRIMES IN HAITI?*, 31 *TEX. INT'L L.J.* 9 (1996).

68. See Anthony D'Amato, *Peace vs. Accountability in Bosnia*, 88 *AM. J. INT'L L.* 502 (1994).

pect of the post-conflict society rarely addressed. During the conflict, different civil organizations may have been strengthened, either in their resistance to the regime or in the bare necessities of survival on all levels. In the rehabilitation of the society and its people, the reinforcement and recognition of non-governmental groups, both official and unofficial, is important. Restoration needs to occur on all levels, formal and informal. The challenge is how these groups can be successfully integrated within the transition process and how to keep these three “r’s” from becoming a dialogue between elites.

The role played by the institution of law in the reconstruction of the social system and in the reconstruction of the *polis* has been explored by Arthur Stinchcombe in light of the policy of lustration.⁶⁹ Stinchcombe examines the role of law as a constitution builder in the transition period from conflict to post-conflict, and the extent to which the constitutional (law) can address the unconstitutional (terror and victimization). He notes that the constitution of law is especially threatened by the norms, incentives, liabilities, and immunities of organs of terror and concludes in part that criminal law is a very clumsy and sticky system for reconstruction of a social system.

What is the role for law in reconciliation? Reconciliation appears to have taken over from retribution as an aim in post-conflict redress. The Security Council resolution that created the International Criminal Tribunal for Rwanda stated that prosecutions will contribute to “the process of national reconciliation and to the restoration and maintenance of peace.”⁷⁰ Jean-Bertrand Aristide, in his support for the Haitian amnesty, stated, “This amnesty is part of the reconciliation and rebuilding process. Let our commitment to peace be our contribution to democracy.”⁷¹

What then of the victims? What is the impact of such “reconciliation” for them? Is “national reconciliation” another path to impunity? And is it true reconciliation?⁷² It is necessary to heed the words of Roman Catholic Priest Luis Pérez Aguirre of Uruguay, who remarked that

[p]erhaps we should begin by being silent and listening because we do not have the first word in this matter The victims are the only ones who can begin the dialogue when they are ready to speak. Our duty is to listen to what the victims have to say for themselves and about themselves. Would it be very far from the truth if I said that

69. See Arthur Stinchcombe, *Lustration as a Problem of the Social Basis of Constitutionalism*, 20 L. & SOC. INQUIRY 272 (1995).

70. When the Statute of the International Criminal Tribunal for Rwanda was being adopted, the President of the Security Council, New Zealand representative Keating, stated, “We do not believe that following the principle of ‘an eye for an eye’ is the path to establishing a civilized society, no matter how horrendous the crimes the individuals concerned may have committed.” U.N. Doc. S/PV.3453, at 5.

71. See Scharf, *supra* note 66, at 10; see also Agnes Heller, *The Limits to Natural Law and the Paradox of Evil*, in ON HUMAN RIGHTS: THE OXFORD AMNESTY LECTURES 1993, at 149-75 (Stephen Shute & Susan Hurley eds., 1993) (particularly her conceptualization of “arguments against punishing the perpetrators of evil”).

72. See Vojin Dimitrijević, *Dimensions of State Responsibility for Gross Violations of Human Rights and Fundamental Freedoms Following the Introduction of Democratic Rule*, COMMISSION NATIONALE CONSULTATIVE DES DROITS DE L’HOMME & THE INTERNATIONAL COMMISSION OF JURISTS, JUSTICE NOT IMPUNITY (1992) [hereinafter JUSTICE NOT IMPUNITY].

the defenders of human rights, as well as others, talk so much about their own ideas, political models and analyses of reality, that they do not give the victims a chance to speak?⁷³

The question is whether law can assist in framing such a dialogue, and in comprehensively bringing the unofficial and the official levels together. A dialogue is important, for the danger is that these issues may churn away, unresolved, within a society, and erupt in a variety of ways. The victim community members have their own reconstruction to work through. However, the legal institutional process, as a public societal process, may provide a modicum of support. Elizabeth Jelin writes: “[f]or victims of ‘social catastrophes’ the process of recovery (both individual and collective, both direct and symbolic) requires the support of a social process that acknowledges and names their voids and ‘holes.’”⁷⁴

In terms of broader societal reconciliation, the centrality of law is important. It should not only remain on the personal level (if it is ever there), between perpetrator and victim. In order to be lasting and effective, societal reconciliation must contain some level of institutionalization as well as recognize the many levels of the conflict—local, national, regional, international—and the many groups and institutions within the civil society that have been affected and possibly corrupted. Although it goes beyond the personal, it must clearly include this level. And it is at the personal level that law plays little role, except in the potential framing nature mentioned. In this it is necessary to disagree with one of the general principles as proposed in the Final Report of the “Question of the impunity of perpetrators of violations of human rights (civil and political rights) prepared by Mr. L. Joinet for the Commission on Human Rights.”⁷⁵ The Report proposes that

[t]here can be no just and lasting reconciliation, as stated in principle 11, without an effective response to the need for justice; the prerequisite for any reconciliation is forgiveness, which is a private act that implies that the victim knows the perpetrator of the violations and that the latter has been able to show repentance. Over and above any verdict, that is the essential purpose of the right to justice.⁷⁶

Forgiveness is indeed a private act. Law may be able to “frame” such an act, however it is not a prerequisite to societal restoration nor reconstruction, and is possibly an element to be left fully outside the scope of law and the goals of the post-conflict society. Whether forgiveness is justice (and consequent to its right) is for the victim or survivors to decide. Law has no place here.

G. Prevention, Deterrence, and Correction

To what extent can using the law to address these conflicts prevent future conflicts? Can the reorganization and the strengthening of the legal and the political system and of the civil society ensure that such conflicts do not reoc-

73. Luis Perez Aguirre, *The Consequences of Impunity in Society*, in JUSTICE NOT IMPUNITY, *supra* note 72.

74. Jelin, *supra* note 27, at 52-53.

75. U.N. Doc. E/CN.41, Sub.2/1996/18, 19 June 1996.

76. *Id.* at 14.

cur? Does such prosecution actually strengthen the legal system? It has been argued in mostly general terms, without regard to particular legal cultures, that prosecution post-conflict strengthens respect for the rule of law and legal institutions, whereas the danger in alternative legal mechanisms such as Truth Commissions is that the rule of law is weakened when there is perceived to be little or no direct accountability. If we look outside the thus termed Western legal system, Stephen Marks argues in relation to Cambodia that Cambodia lacks the legal traditions to expect courts to settle matters fairly and has a religious tradition that teaches reconciliation without accountability.⁷⁷ Toward this end, Kassie Neou, the Director of the Cambodian Institute of Human Rights, proposes an approach to the “policies and practices of the past” that is compatible with the cultural foundations of Cambodian society: remembrance without vengeance but with human rights education.⁷⁸ Note too Arthur Stinchcombe’s observation that the meaning of the facts of the old regime is first of all a contribution to constitutional dialogue, not a contribution to prosecution.⁷⁹

We may be placing too much faith in criminal prosecution if we expect such trials post-conflict to provide the basis for the future of the society. As it has not yet been demonstrated how law can work toward systemic institutional change, it is unclear how law can provide a solid basis for the non-repetition of such societal breakdown. The focus on the past may send the message that this was wrong and should not be repeated, but it does not provide the basis nor importantly the tools for how such events in the future may be prevented. The debates surrounding such trials and commissions, on the notion of citizenship, political legitimacy, and the rule of law are important, yet may be better incorporated into non-criminal proceedings.

It is necessary to distinguish between prevention and deterrence. The result of prevention is that basic values will change. The result of deterrence is that people who consider perpetrating particular actions will recognize the costs involved, and will engage in a “cost-benefit analysis.” Prevention therefore equals a change in values, and deterrence equals a change in attitudes.

Deterrence in the meaning of a cost is clearly subjective. What may deter one may not deter another; what the majority of a given society deem to be a cost may differ among societal and cultural settings. Or, conversely, the meaning of pardon may differ among cultures.⁸⁰ And when this differs among

77. See Stephen P. Marks, “*The Policies and Practices of the Past*”: *Impunity in Cambodia*, 18 FLETCHER F. WORLD AFF. 17, 40 (1994).

78. See *Id.*

79. See Stinchcombe, *supra* note 69.

80. Note the remarks of Emmanuel Decaux, commenting on the treatment of the instigators of the violent suppression of the pro-democracy student movement in Thailand in 1976, and of coups and other rebellions:

Because the notions of individual safety and pardon in this country are closely linked, the leaders of the coups and members of the communist rebellion were granted amnesty. In the case of Admiral Prapas, one of the chief instigators of the 1976 student crushing, retirement as a priest in a Buddhist monastery was equivalent to a pardon in the eyes of the population.

Emmanuel Decaux, *International Law and National Experiences*, in JUSTICE NOT IMPUNITY, *supra* note 72, at 57.

communities, can a universal standard co-exist? The range of deterrence may begin with an act of confession. At the other end of the spectrum is the death penalty on which the world is substantially divided. Quite clearly, an act of confession may not satisfy a number of societies' perception of cost. This leaves few options known to traditional law and criminology: fines, imprisonment, community service, and personal reparations. It is naturally dependent, too, on how it is done. The challenge then for any systemic and coherent international criminology is to both allow societies to have flexibility and imagination in choosing remedies (including combinations of remedies) and to remain within a universalistic framework that will maintain a level of consistency between post-conflict situations.⁸¹ In so doing, the fundamental principle of fairness and equity will be upheld.

The question here is to what extent future perpetrators may be influenced by the way in which the post-conflict situation unfolds. This has been a key issue. If it is seen that perpetrators (and, arguably, those who have engaged in the highest level of victimization) are not subject to criminal prosecution, then will this encourage future violations? On the other hand, to what extent do criminal prosecutions deter future violations? Diane Orentlicher argues that criminal punishment is the most effective insurance against future repression.⁸² The counter argument is that those who commit such crimes have no thought of potential redress, canceled out by an overwhelming belief in the "rightness" of their actions, often in the name of "survival."⁸³

Neither criminal prosecution nor truth commissions may fully deter, prevent, or even "correct." Yet depending on where law is placed in the society, legal mechanisms may provide a basis for these goals, a basis that, if it is to be successful in the future, must be reinforced at the non-legal level.

V

CONCLUSION

We have not yet found an alternative to replace or equalize the power and legitimacy of law in providing accountability for crimes committed. Law is the key centralizing institution possessed by modern societies. Yet how successful is law in filtering down, in disseminating information, and in fostering aware-

81. Two further questions are how is such discretion to be monitored and to what extent can this be achieved within the current international legal regime?

82. See Diane F. Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*, 100 YALE L.J. 2537, 2542 (1991).

83. Note the speech given by Himmler to senior SS officers in Poznan, Oct. 4, 1943. Speaking of the extermination of the Jewish people, he said in part:

This is an unwritten and never-to-be-written page of glory in our history.... We had the moral right, we had the duty towards our people, to destroy this people that wanted to destroy us.... All in all, however, we can say that we have carried out this most difficult of tasks in a spirit of love for our people. And we suffered no harm to our inner being, our soul, our character.

Reprinted in DOCUMENTS ON THE HOLOCAUST: SELECTED SOURCES ON THE DESTRUCTION OF THE JEWS OF GERMANY AND AUSTRIA, POLAND, AND THE SOVIET UNION 344-45 (Yitzhak Arad et al. eds., 1981).

ness, reconciliation, and reconstruction? Do law and legal mechanisms provide the necessary future basis and direction for the post-conflict society? What happens when legal justice takes place outside the nation-state, beyond the “site” of the conflict, in the realm of the international? What is its impact then, or when it only touches a few? Shall we not be content in stating that the employment of law post-regime conflict provides the “foundation moment” for further accountability work and for societal change? Law can provide a key reference point for the post-conflict society. The institution of law has access to all spheres within the modern society, public and private. On some level, it frames all spheres. However, the question is where it can and does have the *greatest success*? (And how, indeed, one can measure this.)

It seems to me that in discussions of the post-conflict society and its goals, it is too readily assumed that, where structurally possible, law should (or, rather, can) play a central role. What I am suggesting is that the institution of law cannot always achieve the full range of “public order” post-conflict goals. Dependent on the context, it can do certain things particularly well, namely provide redress, accountability, legal justice, official acknowledgment, “mark” what has happened. The specific role of law needs to be clear, so that legal mechanisms will not end up doing a number of things badly. Although law is a crucial piece in the mosaic of the post-conflict accountability picture, there are spheres, particularly at the communal and individual levels, where it may not help as much as we may hope. Rather, I suggest—and this is an area in which more work needs to be done—that institutions other than law need to be explored and, where necessary, strengthened in order to do the job we may have hoped or assumed law would do. It is important that the particularities of the society and the situation be worked with, from both within (the strengths of the society itself) and without (the international community). Such a combination of mechanisms will ensure a realistic and effective role for the institution of law, on the national, international, regional, communal, and personal levels.

The other area in which work needs to be done is that of the tension and connection between individual accountability and institutional accountability. There are differences between individual accountability and institutional accountability. Institutional accountability is different from broad societal or institutional guilt. Institutional accountability includes, firstly, the recognition of the role that certain institutions played in the victimization and, secondly, the recognition that due to this transformation, there needs to be a program of systemic reform. Essentially, for crimes of state, individual accountability is not adequate in addressing what has happened. Another key question involves an exploration of what is most appropriate for different legal cultures. What is the balance between imposition and absorption and interaction? Notwithstanding the universality of human rights norms, it is clear that law will only be partially successful when imposed.

As such, in order to incorporate these three particular problems—that law cannot and should not “do it all”; the “unravelling” of institutions and the distinction between individual and institutional accountability; and the necessity

of building something more than an ad hoc relationship between the global universal and the particular national—it is clear that the development of a comprehensive normative theory of international criminology is necessary.